Nos. 04-1034 and 04-1384

FILED
JAN 13 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RAPANOS, ET AL.,

Petitioners,

v.

U. S. ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

CARABELL, ET AL.,

Petitioners,

v.

U. S. ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF AMERICAN RIVERS, ENVIRONMENTAL DEFENSE, NATIONAL AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, PHYSICIANS FOR SOCIAL RESPONSIBILITY, SIERRA CLUB, TIP OF THE MITT WATERSHED COUNCIL, AND WATERKEEPER ALLIANCE IN SUPPORT OF RESPONDENTS

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January 13, 2006

RULE 29.6 STATEMENT

American Rivers, Environmental Defense, National Audubon Society, Natural Resources Defense Council, Physicians for Social Responsibility, Sierra Club, Tip of the Mitt Watershed Council, and Waterkeeper Alliance are nonprofit corporations. They have no parent corporations and none are publicly held.

TABLE OF CONTENTS

Page

RULE 29 STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

INTRODUCTION 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE CORPS AND EPA PROPERLY CONCLUDED THAT THE ACT'S PERMIT SAFEGUARDS PROTECT TRIBUTARIES OF TRADITIONALLY NAVIGABLE WATERS. 6

A. Coverage of Tributaries Is Consistent With—Indeed, Required By—the Act.. 6

B. Exclusion of Tributaries Would Contravene This Court's Settled Precedent, and Would Revive Common Law Causes of Action that This Court Has Held Preempted. 16

C. Petitioners' Arguments Offer No Basis for Overturning the Long-Standing Inclusion of Tributaries. 18

II. THE CORPS AND EPA PROPERLY CONCLUDED THAT THE ACT'S PERMIT SAFEGUARDS PROTECT WETLANDS ADJACENT TO TRIBUTARIES 25

III. APPLYING PERMIT SAFEGUARDS TO TRIBUTARIES AND THEIR ADJACENT WETLANDS IS WELL WITHIN CONGRESS'S COMMERCE CLAUSE POWER. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Barnhart v. Walton,
535 U.S. 212 (2002) 8

Borden Ranch Partnership v. U.S. Army Corps of Engineers,
261 F.3d 810 (9th Cir. 2001),
aff'd, 537 U.S. 999 (2002) 27

Chao v. Mallard Bay Drilling,
534 U.S. 235 (2002) 13

Chevron, USA v. NRDC,
467 U.S. 837 (1984) 6, 25

Citizens Bank v. Alafabco,
539 U.S. 52 (2003) 29

Gonzales v. Raich,
125 S. Ct. 2195 (2005) 29

Hodel v. Virginia Surface Mining and Reclamation Association,
452 U.S. 264 (1981) 28, 29

Illinois v. Milwaukee,
406 U.S. 91 (1972) 18

International Paper Co. v. Ouellette,
479 U.S. 481 (1987) 4, 7, 16, 17, 18

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 28

Koons Buick Pontiac GMC v. Nigh,
125 S. Ct. 460 (2004) 13

Milwaukee v. Illinois,
451 U.S. 304 (1981) 4, 7, 16, 17, 18

NRDC v. Callaway,
392 F. Supp. 685 (D.D.C. 1975) 8

Norwegian Nitrogen Products Co. v. U.S.,
288 U.S. 294 (1933) 8

Oklahoma v. Guy F. Atkinson Co.,
313 U.S. 508 (1941) 20

Raygor v. Regents of U. of Minnesota,
534 U.S. 533 (2002) 13

Shepard v. U.S.,
125 S. Ct. 1254 (2005) 17

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,
531 U.S. 159 (2001) 1, 2, 11, 17

South Fla. Water Management District v. Miccosukee Tribe,
541 U.S. 95 (2004) 24

TRW v. Andrews,
534 U.S. 19 (2001) 11

US Airways, Inc. v. Barnett,
535 U.S. 391 (2002) 13

U.S. v. Ashland Oil and Transport Co.,
504 F.2d 1317 (6th Cir. 1974) 7, 14, 22

U.S. v. Riverside Bayview Homes,
474 U.S. 121 (1985) ..... *passim*

United States v. Deaton,
332 F.3d 698 (4th Cir. 2003) 19, 22

United States v. Eidson,
108 F.3d 1336 (11th Cir. 1997) 19, 24

STATUTES

Clean Water Act
§ 101, 33 U.S.C. § 1251 ..... 13, 15
§ 301, 33 U.S.C. § 1311 ..... 2, 13, 21
§ 302, 33 U.S.C. § 1312 21
§ 303, 33 U.S.C. § 1313 ..... 13, 15, 21, 29
§ 311, 33 U.S.C. § 1321 3
§ 401, 33 U.S.C. § 1341 3
§ 402, 33 U.S.C. § 1342 ..... 2, 6, 12
§ 404, 33 U.S.C. § 1344 ..... *passim*
§ 502(7), 33 U.S.C. § 1362(7) 1, 2, 3, 6, 22
§ 502(12), 33 U.S.C. § 1362(12) 2
§ 502(14), 33 U.S.C. § 1362(14) 22, 23

Refuse Act
33 U.S.C. § 407 7

REGULATIONS AND FEDERAL REGISTER

33 C.F.R. § 328.3 ..... 6, 25
38 Fed. Reg. 13528 (May 22, 1973) 8
39 Fed. Reg. 12115 (April 3, 1974) 8

LEGISLATIVE HISTORY

Legislative History of the Water Pollution Control Act Amendments of 1972 (Jan. 1973) 6

Legislative History of the Clean Water Act of 1977 (October 1978) 8, 9, 10, 11, 29

Section 404 of the FWPCA of 1972, Hearings before the Senate Committee on Public Works, Serial No. 94-H49 (July 27, 1976) 9

OTHER MATERIALS

Corps of Engineers, EP 1165-2-1, "Digest of Water Resources, Policies, and Authorities," July 30, 1999 26

Council on Environmental Quality, Environmental Trends (1989) 23

Cheryl Dybas, "By the Dark of the Moon, Eels Slither Out to the Sea," *Washington Post* (Oct. 9, 1996) 15

Gov't of the District of Columbia, Storm Water Management Plan (D.C. Oct. 19, 2002) 12, 15

Tom Horton, *Bay Country* (Johns Hopkins Press 1987) 14, 15, 27

Jonathan Lyman, *Alaska's Wild Salmon* (Alaska Dept. of Fish & Game 2002) 14

William Mitsch, *et al.*, "Reducing nitrogen loading to the Gulf of Mexico from the Mississippi River basin: Strategies to counter a persistent ecological problem," 51 *BioScience* 373 (2001) 19

Nancy Rabalais, *et al.*, "Beyond science into policy: Gulf of Mexico hypoxia and the Mississippi River," 52 *BioScience* 129 (2002) 19

Rock Creek Fisheries Study, prepared for National Park Service (Nov. 5, 1993) 15

U.S. v. D.C. Water and Sewer Auth., D.D.C. 00cv183 (TFH), Consent Decree Entered Mar. 23, 2005 12

L. Wood, Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands, 34 Envtl. L. Rptr. 10187 (2004) 7

STATEMENT OF INTEREST

American Rivers, Environmental Defense, National Audubon Society, Natural Resources Defense Council, Physicians for Social Responsibility, Sierra Club, Tip of the Mitt Watershed Council, and Waterkeeper Alliance ("Environmental Amici") all have a long history of involvement in, and expertise concerning, the protection of our Nation's waters and the implementation of the Clean Water Act. Through testimony in Congress, comments and other advocacy in the Executive Branch, and litigation in the courts, they have pursued these interests repeatedly during the three decades since enactment of the seminal 1972 amendments that gave the Act its current structure. All of these organizations have members and supporters who use and rely on a wide array of waters throughout our Nation for recreation, scientific study, and protection of their health, safety, property, drinking water, and food supply.[1]

INTRODUCTION

At issue is the geographic scope of the Clean Water Act's core safeguard—the requirement to obtain a permit before discharging pollutants to "waters of the United States." § 502(7). In their quest to exempt their discharges from that safeguard, Petitioners and their *amici* rely heavily on *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), which they

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[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned represent that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than the above-named amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

interpret as conditioning permit jurisdiction on a "significant nexus" to traditionally navigable waters. While Environmental Amici submit that neither *SWANCC* nor the Act establishes such a nexus requirement, the Court need not address that issue here. Unlike the "isolated" waters at issue in *SWANCC*, *see* 531 U.S. at 171, these cases involve wetlands adjoining tributaries of the Great Lakes. As this brief will show, the Corps of Engineers' regulations properly apply the Act's permit requirements to tributaries of traditionally navigable waters (Part I, *infra*), as well as wetlands adjacent to such tributaries (Part II, *infra*).

Initially, while the specific discharges at issue here are governed by the Act's § 404 permit program, it bears emphasis that the interpretational issue posed here goes well beyond § 404. Specifically, both the § 404 authority to grant permits for discharges of dredged or fill material, and the § 402 permit program for discharges of all other pollutants, only come into play if a discharge is otherwise prohibited under § 301.

The § 301 prohibition does not apply, and no Clean Water Act discharge permit is required in the first place, unless there is a "discharge of any pollutant." § 301(a). Significantly, the Act defines "discharge of a pollutant" as *inter alia* the addition of any pollutant to "navigable waters" from any point source. § 502(12). The Act in turn defines "navigable waters" as *inter alia* "the waters of the United States." § 502(7).

Thus, if a given water is not among "the waters of the United States," the § 301(a) discharge prohibition does not apply, and—with very few exceptions[2]—that water can

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[2] In the case of oil or hazardous substances, the Act bars not only discharges of those pollutants into navigable waters, but

(... footnote continued next page)

suffer discharges of any type of pollutant whatsoever without any Clean Water Act permit. Thus, these cases pose the question whether the Clean Water Act regulates any discharges into the great majority of this country's tributaries and adjacent wetlands—involving not just discharges of dredged or fill material, but also discharges of sewage, sediment and toxic chemicals such as cyanide from factories.[3]

Moreover, the Act grants states authority they would not otherwise have to control discharges in connection with other federal licenses (such as hydroelectric licenses)—even when no pollutant is discharged. *See* § 401. Because those safeguards apply only to discharges "into the navigable waters," § 401(a)(1), a crabbed reading of the § 502(7) definition would work serious harm on this key Clean Water Act program as well.

Under Rapanos's theory (Br. 9), the only rivers and streams protected by the Act would be "traditional navigable waters" (*i.e.*, the same water bodies regulated by Section 10 of the Rivers and Harbors Act of 1899), and tributaries directly abutting those waters. In Michigan, just 496 miles out of 54,300 miles of rivers and streams—or 0.9%—are traditionally navigable. Memo from Diana Klemans, Michigan Department of Environmental Quality (Jan. 10, 2006).[4] Under Rapanos's theory, the bedrock interpretation

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(... footnote continued from previous page)
also discharges affecting maritime or federal resources. § 311(b)(3), § 33 U.S.C. 1321(b)(3).

[3] *See* www.earthjustice.org/brief/Region_1.pdf (comments by EPA Region I, at 9-12); www.earthjustice.org/brief/R3J.pdf (comments by EPA Region III, Appendix J)

[4] *See* www.earthjustice.org/brief/MichMemo.pdf.

prevalent since 1972 would be reversed, and the overwhelming majority of the hundreds of thousands of permits issued to sewage treatment plants, factories and dredge and fill operations since that date would have been unnecessary.

SUMMARY OF ARGUMENT

To accept Petitioners' argument that tributaries of larger waterways are excluded from the Act's protections, the Court would have to conclude that the 1972 authors of the Clean Water Act intended to dramatically cut back on the preexisting geographic scope of water pollution law. In language dating back to the McKinley Administration, the predecessor statute already covered discharges into tributaries. The notion that Congress intended the 1972 Act to cut back on law from the previous century is untenable.

As this Court has recognized, the 1972 Act's authors considered the predecessor legislation to be "inadequate in every vital aspect," and responded by enacting a "comprehensive" statute whose intent "was clearly to establish an all-encompassing program of water pollution regulation." *Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981) (citation omitted). Thus, the Act "applies to all point sources and virtually all bodies of water." *Intl. Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

Petitioners' theory would also undermine two key preemption holdings of this Court. *Milwaukee* and *Ouellette* expressly relied on the Act's comprehensive scope in holding that the Act preempted the common law of downstream states as well as federal common law. Were the Court to hold that tributaries and adjacent wetlands are outside the Act's safeguards, the Act would be anything but "comprehensive" and "all-encompassing," but instead would apply only to a tiny fraction of the Nation's waters. Under that scenario, the rationale underlying *Milwaukee* and *Ouellette* would no

longer be viable, and the common law remedies preempted by those precedents would spring back to life.

Once the error is recognized in Petitioners' attempt to exclude tributaries, their corresponding attempt to exclude wetlands adjacent to those tributaries must likewise be rejected. This Court long ago recognized that Congress intended the Corps' jurisdiction to "extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction." *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 138 (1985) (emphasis added).

The agencies acted reasonably in applying the Act's safeguards categorically to tributaries and wetlands. That categorical coverage does not halt meritorious projects, but on the contrary allows them to go forward through issuance of discharge permits. *See Bayview*, 474 U.S. at 135 n.9.

The legislative history shows that Congress intended the Act to extend to tributaries, in order to protect traditional navigable waterbodies from pollution flowing downstream and to avoid unequal regulatory approaches that would give upstream dischargers an unfair advantage over their downstream competitors. Petitioners' effort to subject the Act to radical surgery would undermine these objectives, as well as economic interests expressly protected by the Act, including public water supplies and fisheries. This Court's precedent has recognized all these goals as legitimate grounds for exercise of Congress's Commerce Clause power.

ARGUMENT

I. THE CORPS AND EPA PROPERLY CONCLUDED THAT THE ACT'S PERMIT SAFEGUARDS PROTECT TRIBUTARIES OF TRADITIONALLY NAVIGABLE WATERS.

A. Coverage of Tributaries Is Consistent With—Indeed, Required By—the Act.

The Corps' longstanding permit regulations (like EPA's) expressly encompass tributaries of traditionally navigable waters. 33 C.F.R. § 328.3(a)(5). Petitioners have shown neither that this regulation contravenes clearly expressed congressional intent under Step One of *Chevron, USA v. NRDC*, 467 U.S. 837, 842-43 (1984), nor that it is an unreasonable interpretation under Step Two. *Id.* 844.

1972 Amendments. The 1972 Congress deliberately extended the Act's protections to "the waters of the United States," § 502(7), and did not base the key definition on "the navigable waters of the United States" as initial versions would have done. *See* Legislative History of the Water Pollution Control Act Amendments of 1972 (Jan. 1973), at 1698 (emphasis added). Preexisting water pollution law provides key context for Congress's pointed omission of the word "navigable" from § 502(7).

Specifically, the Act's core permit program—the § 402 National Pollutant Discharge Elimination System program—was designed to supersede the preexisting permit program under the 1899 Refuse Act. Section 402 provides *inter alia* that permits previously issued under the Refuse Act would thenceforth constitute NPDES permits, and that no further Refuse Act permits would be issued. § 402(a)(4) and (5).

Tellingly, the Refuse Act does not merely govern discharge into traditionally navigable waters. To the contrary,

it encompasses discharge "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 33 U.S.C. § 407 (emphasis added).

Thus, to conclude that tributaries of traditionally navigable waters are exempt, one would have to believe that the 1972 Congress cut back the geographic scope of the predecessor statute. Indeed, the cutback would be dramatic. In the Missouri River watershed, for example, there are by conservative estimate 559,669 miles of traditional navigable waters plus tributaries, of which traditional navigable waters represent only 3,151 miles—less than 1%. L. Wood, Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands, 34 Envtl. L. Rptr. 10187, 10193 n.32 (2004).

The notion that Congress intended any such cutback is untenable. To the contrary, faced with rivers literally catching fire due to pollution, *see U.S. v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974), the 1972 Congress concluded that "the previous legislation was 'inadequate in every vital aspect'"—and responded by enacting a "comprehensive" statute whose intent "was clearly to establish an all-encompassing program of water pollution regulation." *Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981) (citation omitted). Indeed, the Clean Water Act "applies to all point sources and virtually all bodies of water." *Intl. Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). Rapanos's claim would instead dramatically shrink federal water pollution permitting back to a narrow geographic scope not seen since the McKinley Administration.

EPA's contemporaneous interpretation. Given this background, it is not surprising that the very first agency

regulation defining the scope of covered waters encompassed not only "[a]ll navigable waters of the United States," but also "[t]ributaries" of those waters. 38 Fed. Reg. 13529 (May 22, 1973). This 1973 regulation was issued by EPA, the agency primarily responsible for implementing the Act, and it pre-dated the Corps' initial, narrower 1974 regulation. *See* 39 Fed. Reg. 12115 (April 3, 1974). Likewise, EPA's 1973 definition was issued two years before a federal district court overturned the 1974 Corps regulation, *see NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), and thus was not prompted by court order.

"[T]his Court will normally accord particular deference to an agency interpretation of longstanding duration." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (citation omitted). Indeed, such deference "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294, 315 (1933) (emphasis added).

1977 Amendments. The 1977 Amendments further confirm the inclusion of tributaries. During the deliberations on those amendments, attempts were made to narrow the waters covered by the Act (and by the Refuse Act). Under the proposed narrowing language, the permitting safeguards of those statutes would have encompassed only traditionally navigable waters, together with wetlands that were both "contiguous or adjacent" to such waters and "periodically inundated." *See, e.g.*, Legislative History of the Clean Water Act of 1977 (October 1978), at 901. However, though such language was passed by the House, the Senate—and ultimately Congress as a whole—rejected it. *Bayview*, 474 U.S. at 136-37.

In congressional hearings, the Department of Justice sharply criticized the proposed limiting language. It was

"crystal clear," the Department noted, that the Refuse Act "by express statutory language reaches pollution in non-navigable tributaries of navigable waters." Section 404 of the FWPCA of 1972, Hearings before the Senate Committee on Public Works, Serial No. 94-H49 (July 27, 1976), at 108 (statement of Assistant Attorney General Peter Taft).[5] The proposed amendment cutting back that coverage "is highly objectional [sic] and could serve to undermine the whole national effort under the Federal Water Pollution Control Act and the 1899 Rivers and Harbors Act to protect our waters from toxic and harmful substances." *Id.* 122 (emphasis in original).

Under that language, the Justice Department noted, "we could not have brought the 456 counts in an indictment under the Refuse Act against Allied Chemical for its discharges of Kepone and other toxics between July 1971 and October 1972 into the nonnavigable Gravelly Run flowing into the James River." *Id.* Likewise, under the proposed language, "an earth-fill dam could now be built across a major tributary supplying much of the water flow to a navigable river, cutting off that flow. Since such an activity would involve a discharge of fill material into a 'non-navigable' water under [the proposed language], it would be exempt." *Id.* 123. In sum, the proposed language was "a direct attack upon the general ability of the United States to protect its public waters and would send us back to the last century." *Id.* 124.

By the time the proposed limiting language reached the Senate floor, such criticisms had placed its supporters on the defensive. The sponsor of that language—Senator Bentsen—noted that an opponent "was calling news organizations throughout Washington yesterday and advising them that this legislation would permit toxic discharges into smaller, non-navigable, waterways." 1977 Legislative History at 905.

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[5] *See* www.earthjustice.org/brief/DOJ1976.pdf.

According to Senator Bentsen, "[n]othing could be further from the truth." *Id.* Likewise, responding to a newspaper editorial warning that "[t]he dumping of toxic spoil in a creek, for instance, can poison water supplies miles downstream," *id.*, Senator Bentsen protested that "we do not propose to change the law and permit any relaxation of our efforts to clamp down on the dumping of sewage or 'toxic spoil' or any other toxic discharges in even the smallest creek in this Nation." *Id.* 906. *Accord, id.* 939 (Sen. Dole: "The argument has been made that the Bentsen amendment would allow the dumping of toxic substances into a stream such as that found in Rock Creek Park. That simply is not true.").

Notwithstanding Senator Bentsen's reassurances, opponents of his amendment argued that it would allow toxic discharges into tributaries. For example, Senator Hart argued that under the amendment, "substances such as mercury and cadmium, PCBs, arsenic, oil, and grease, which are contained in much of the dredged material of this country, could be dumped into the waterways and wetlands as a result of the dredging activity." *Id.* 909. For example, "if the tributaries of the James River contain Kepone in their sediment, we could have, under this program, a situation where those tributaries would be dredged and that dredged spoil could be deposited back to the waterways or into the adjacent wetlands releasing that toxic material into those waterways." *Id.* Indeed, Senator Hart indicated that the amendment "will remove 98 percent of all the rivers, streams, and lakes from the protection program which the Congress has adopted." *Id. See also id.* 911 (Sen. Stafford), 929-30 (Sen. Muskie), 916-19 (Sen. Chafee).

Likewise, Senator Baker emphasized that "[c]omprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless Federal jurisdiction is uniformly implemented for all waters, dischargers located on

nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors." *Id.* 920.

Thus, in debating the unsuccessful attempt to narrow the Act's geographic scope, neither side expressed support for the result Rapanos urges here: open season to dump toxic pollutants into tributaries of traditionally navigable waters. Even the brief of the Solid Waste Agency in *SWANCC* disclaimed any such argument. To the contrary, the Agency argued that critics of the proposed 1977 narrowing amendment "successfully advocated retaining the limits of the 1972 Act to protect the '[f]ederal interest in waterways other than those on which a ship can be floated,' including 'small streams, marshes, wetlands, and swamps which will make their way into the bigger waterways of this country.'" Reply Brief of SWANCC, 2000 WL 1532361 (Oct. 13, 2000), at 14-15 (quoting Sen. Hart). Instead of limiting the 1972 Act's geographic scope, "Congress adopted a compromise" that allowed certain activities to go forward either without a permit (§ 404(f)) or with a general permit (§ 404(e)). Opening Brief of SWANCC, 2000 WL 1041190 (July 27, 2000), at 25-26.

Likewise significant is another feature of that compromise. The 1977 Amendments authorize delegation of the § 404 program to states, but only as to waters "other than" traditionally navigable waters and adjacent wetlands. § 404(g)(1). If § 404 applied only to traditionally navigable waters and adjacent wetlands, the "other" waters referenced by § 404(g)(1) would be an empty set. A reading that renders Congress's carefully crafted delegation provisions a dead letter would violate fundamental principles of statutory interpretation. *See TRW v. Andrews*, 534 U.S. 19, 31 (2001). Thus, in *SWANCC* this Court recognized that it is plausible to read § 404(g)(1)'s reference to "other" waters as

encompassing "nonnavigable tributaries and streams." 531 U.S. at 171.

1987 and 2000 Amendments. In amendments enacted in 1987 and 2000, Congress made clear its intent that Clean Water Act permit requirements apply to two key categories of discharges: separate storm sewer discharges (§ 402(p)) and combined sewer overflow discharges (§ 402(q)). These largely urban systems include large numbers of discharge points, many of them on small tributary streams.

Appendix A includes photographs of examples in the District of Columbia, including an outfall into Piney Branch and two outfalls into Soapstone Creek. Hundreds of outfalls line the District's small streams, which flow into the Potomac River—either directly or via other tributaries.[6] The pictured outfalls—like many thousands of others around the Nation—are covered by NPDES permits.[7] Indeed, violations of one of those permits led to a consent decree that will require reductions in raw sewage discharges from the Piney Branch CSO outfall.[8] Yet under Rapanos's theory, these outfalls would not be required to have Clean Water Act permits at all, and would be free to continue uncontrolled discharge of raw

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[6] Storm Water Management Plan (D.C. Oct. 19, 2002), Table 3.2-1, *see* www.earthjustice.org/brief/DCStorm Excerpt.pdf.

[7] www.epa.gov/reg3wapd/npdes/pdf/DC_MS4_Permit_CAD-5-04.pdf; www.epa.gov/reg3wapd/npdes/Blue_Plains_Permit_Final.pdf.

[8] Consent Decree in *U.S. v. D.C. Water and Sewer Auth.*, D.D.C. 00cv183 TFH (entered Mar. 23, 2005), at 20-21.

sewage and a variety of other pollutants that would harm both the tributaries and larger downstream waters.[9]

Statutory context and purpose. Statutes are to be read in a "holistic" manner, *Koons Buick Pontiac GMC v. Nigh*, 125 S. Ct. 460, 466-67 (2004), viewing individual provisions "in their context and with a view to their place in the overall statutory scheme," *Raygor v. Regents of U. of Minnesota*, 534 U.S. 533, 545-46 (2002) (citation and internal quotations omitted), and in light of the Congressional purpose. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (rejecting reading under which statute "could not accomplish its intended objective"); *Chao v. Mallard Bay Drilling*, 534 U.S. 235, 245 n.9 (2002) (an interpretation that would leave "large gaps in the regulation of occupational health and safety" would be "plainly inconsistent with the purpose of the [Occupational Safety and Health] Act"). These principles further support the Corps' conclusion that the Act's permit safeguards apply to tributaries.

The Act's overarching purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a). In furtherance of that goal, the Act's substantive provisions require establishment and achievement of water quality standards sufficient *inter alia* "to protect the public health or welfare." § 303(c)(2)(A). *See also* 301(b)(1)(C). Section 404 itself expressly safeguards against unacceptable adverse impacts on several enumerated environmental indicators. § 404(c).

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[9] According to EPA's Region III office, stormwater "is responsible for 21 percent of impaired lakes and 45 percent of impaired estuaries in the United States. In addition, in the Mid-Atlantic Region alone, storm water is responsible for 5,265 miles of impaired streams." *See* www.epa.gov/reg3wapd/stormwater/index.htm.

Pollutant discharge into tributaries works against these provisions by *inter alia* harming water quality in traditionally navigable waters downstream. If Congress's "authority to control pollution was limited to the bed of the navigable stream itself," "[t]he tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste." *Ashland*, 504 F.2d at 1326.

Beyond the harms caused when pollutants are transported from tributaries into larger waters downstream, discharges into tributaries work against the statute by harming the tributaries themselves.

First, altered hydrology caused by discharges of pollutants affects the flow of water from upstream tributaries into the traditionally navigable waters—increasing the flow so as to cause flooding, or reducing it so as to shrink the downstream waterway. Indeed, § 404 embodies special concern about such effects. While offering a conditional exemption for certain agricultural and silvicultural activities, § 404 provides that the exemption does not apply—and a permit is required—"where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." § 404(f)(2).

Second, discharge of pollutants can harm fish species in tributaries, which spend part of their life cycle in larger waters downstream. For example, anadromous salmon spawn far upstream, often in tiny streams "small enough to step across," and that are dry part of the year. Jonathan Lyman, *Alaska's Wild Salmon* (Alaska Dept. of Fish & Game 2002), at 22. In the eastern United States, anadromous fish that venture far upstream include herring, a widely distributed fish found in small streams five feet across. Tom Horton, *Bay Country* (Johns Hopkins Press 1987), at 41.

Likewise, catadromous American eels—a commercial species supporting a multimillion dollar fishery in the Chesapeake Bay and along the Atlantic coast—spend much of their life upstream in tiny tributaries, then travel downstream to spawn in the Atlantic Ocean. *Id.* 51-52. Eels "live in nearly every stream in the eastern United States." Cheryl Dybas, "By the Dark of the Moon, Eels Slither Out to the Sea," *Washington Post* (Oct. 9, 1996), at H1 (quoting fisheries scientist). In the District of Columbia, eels have been found in small streams—including Piney Branch,[10] which has numerous outfalls that would not require Clean Water Act permits under Rapanos's theory.[11]

Protection of fisheries is a central feature of the Act, appearing not only in its general purposes statement, § 101(a)(2), but also in its substantive provisions. For example, water quality standards must account for "propagation of fish and wildlife," § 303(c)(2)(A), and § 404 itself safeguards against discharges that unacceptably harm "shellfish beds and fishery areas (including spawning and breeding areas)." § 404(c) (emphasis added).

Third, both the Act's water quality standards provision and § 404 itself provide for protection of public water supplies. §§ 303(c)(2)(A) ("public water supplies"), 404(c) ("municipal water supplies"). In the mid-Atlantic states alone, "between 148 and 526 surface drinking water intakes, serving populations ranging from 535,000 to 3 million people are potentially affected should first and second order streams

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[10] *See* Rock Creek Fisheries Study, prepared for National Park Service (Nov. 5, 1993), at 51, *see* www.earthjustice.org/brief/RockCreekExcerpt.pdf.

[11] *See* D.C. Storm Water Management Plan, *supra* n.6, at Table 3.2-1.

be removed from Clean Water Act jurisdiction." Comments by EPA Region III (May 2003), at 26.[12] Removal of Clean Water Act protection "will likely increase risks to human health and require additional infrastructure expenditures by public utilities using surface water intakes." *Id.*

B. Exclusion of Tributaries Would Contravene This Court's Settled Precedent, and Would Revive Common Law Causes of Action that This Court Has Held Preempted.

This Court's precedent further confirms the Corps' conclusion that the Act's coverage extends to tributaries. As indicated above, *Ouellette* held that the Act "applies to all point sources and virtually all bodies of water," 479 U.S. at 492, and *Milwaukee* emphasized that the 1972 Act was a "comprehensive" statute whose intent "was clearly to establish an all-encompassing program of water pollution regulation." 451 U.S. at 317-19. These rulings refute the interpretation advanced by Rapanos and his allies, under which the Act's permit programs would extend only to a tiny fraction of the nation's waters.

These rulings were holdings, not dicta. *Ouellette*'s holding concerning the breadth of waters covered by the Act was integral to the Court's conclusion that the Act preempted downstream-state common law. While recognizing that courts should not "lightly infer" preemption, *Ouellette* found that preemption "may be presumed when the federal legislation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." 479 U.S. at 491 (citation and internal quotations omitted). The Court went on to cite the Act's broad geographic coverage as a key basis for concluding that

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[12] www.earthjustice.org/brief/R3.pdf.

its regulatory scope was "pervasive," and that "the only state suits that remain available are those specifically preserved by the Act." *Id.* 492.

Likewise in *Milwaukee*, the Court's characterization of the Act's regulatory program as "comprehensive" and "all-encompassing" (451 U.S. at 317-19) was integral to its conclusion that the Act preempted federal common law. According to the Court itself, the Act's comprehensive scope was "quite relevant" to the preemption question. *Id.* 319 n.14.

This Court has emphasized that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation." *Shepard v. U.S.*, 125 S. Ct. 1254, 1261 (2005) (citation and internal quotations omitted). The holdings of *Ouellette* and *Milwaukee* are just as entitled to that respect as *SWANCC*, which neither expressly nor implicitly overruled those two decisions. Indeed, it is unlikely that Chief Justice Rehnquist intended his opinion for the Court in *SWANCC* to overturn prior decisions that he had authored (*Milwaukee*) and joined (*Ouellette*).

In *Shepard*, the Court found that "time ha[d] enhanced even the usual precedential force" of a prior decision, because "nearly 15 years hav[e] passed since [the decision] came down, without any action by Congress to modify" the decision. 125 S. Ct. at 1261. Here, an even longer time has passed without Congressional action repudiating or even questioning the holdings of *Ouellette* or *Milwaukee* concerning the Act's comprehensive scope. Accordingly, the Court should reject Rapanos's frontal assault on those holdings.

Indeed, were the Court to accept Rapanos's invitation to revisit *Ouellette* and *Milwaukee*, the underlying preemption holdings of those cases would have to be revisited as well, with serious disruptive consequences. If discharges to tributaries do not even require Clean Water Act permits,

application of a neighboring state's common law to such discharges (*e.g.*, of Maryland common law to discharges into a Virginia tributary of the Potomac River) could no longer be said to "circumvent the NPDES permit system." *Ouellette*, 479 U.S. at 494. The specter feared by *Ouellette* could come to pass: "But consider, for example, a plant that discharges effluents into the Mississippi River. A source located in Minnesota theoretically could be subject to the nuisance laws of any of the nine downstream States." *Id.* 496 n.17. Under Rapanos's interpretation, these nine downstream states could indeed pursue nuisance actions against a Minnesota source, simply by taking aim at a source discharging into a Minnesota tributary of the Mississippi.

In *Milwaukee*, this Court ruled that the 1972 Act preempted federal common law. The Court relied on the Act's comprehensive scope to distinguish *Illinois v. Milwaukee*, 406 U.S. 91 (1972), where the Court had recognized federal common law notwithstanding the pre-1972 Act. *See Milwaukee*, 451 U.S. at 318 n.10. By abrogating the 1972 Act's comprehensive scope, Rapanos's theory would erase the preemption holding of *Milwaukee* and revive the federal common law cause of action recognized in *Illinois*.

C. Petitioners' Arguments Offer No Basis for Overturning the Long-Standing Inclusion of Tributaries.

The arguments advanced by Rapanos and his allies offer no basis for overturning the longstanding regulations extending the Act's permit programs to tributaries.

"Remote" tributaries. There is no merit to the suggestion that tributaries should *per se* be excluded from permitting based on mere distance from a traditionally navigable waterway, or on intermittency of flow. Water from a so-called "remote" tributary of a traditionally navigable

waterbody flows downstream into that larger waterbody—or else the upstream tributary would not be a tributary. If the water itself can reach the larger downstream waterbody, then pollutants in the water can do the same. And pollutants entering a traditional navigable waterway from upstream do not magically stop posing a threat to that waterway simply because they traveled a long way to get there, or because the waterway does not flow continuously throughout the year.

Careful scientific analysis has, in fact, shown that many of this country's most significant water quality challenges originate in the discharge of pollutants into very small streams and the loss of wetlands adjacent to them hundreds of miles away.[13]

Thus, "[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003) (emphasis added). Moreover, "[p]ollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage." *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997). "Rather, as long as the tributary would flow into the navigable body of water during significant rainfall, it is capable of spreading environmental damage and is thus a water of the United States under the Act." *Id.* (citation and internal quotations omitted). Indeed, as

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[13] *See, e.g.*, Nancy Rabalais, *et al.*, "Beyond science into policy: Gulf of Mexico hypoxia and the Mississippi River," 52 *BioScience* 129, 135 (2002); William Mitsch, *et al.*, "Reducing nitrogen loading to the Gulf of Mexico from the Mississippi River basin: Strategies to counter a persistent ecological problem," 51 *BioScience* 373, 373 (2001).

shown above, pollutants can harm the operation and goals of the Act by causing effects in the tributaries themselves.

Adjacent wetlands. This Court has also recognized that regulation of adjacent wetlands follows from the regulation of tributaries, because even those members of Congress who wished to restrict jurisdiction in 1977 agreed that "whatever jurisdiction the Corps would retain over discharges of fill material after passage of the 1977 legislation should extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction." *Bayview*, 474 U.S. at 138. Because the Corps retained jurisdiction over tributaries, it also retains jurisdiction over wetlands adjacent to those tributaries.

Case-by-case showing. Rapanos and his allies also suggest that the applicability of permitting to a given tributary should depend on a case-by-case showing that the discharge causes harm in a traditionally navigable waterway downstream. The argument is baseless.

As this Court has recognized, the relevant inquiry is whether the challenged regulations target a class of waters properly within the statute's reach, not whether each individual water within the class is significant. *See Bayview*, 474 U.S. at 135 n.9 ("If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.") (emphasis added).

Similarly, this Court has recognized the wisdom of a cumulative effects approach. In a case involving a flood control project on a tributary, the Court refused to consider in isolation whether a single reservoir on a single tributary "will effect a substantial reduction in the lower Mississippi floods." *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508, 527 (1941). "To say that no one of those projects could be constitutionally authorized because its separate effect on

floods in the Mississippi would be too conjectural would be to deny the actual or potential aggregate benefits of the integrated system as a whole." *Id.* 527-28.

The effect of pollutants on waters downstream is cumulative, and the Clean Water Act explicitly requires limitation of pollutants to prevent their cumulative downstream impacts.[14] Under the case-by-case approach, therefore, identical streams would be regulated in some watersheds but not others because of the cumulative effects of all potential discharges, and streams would be regulated in some years but not others depending on the likely cumulative discharges within the watershed. This approach would determine whether a particular discharger was covered under the Act by the order he arrived at the stream, rather than the nature of the discharge. Those who had the "good fortune" of polluting a tributary early on—even larger polluters—might be exempt from the Act's protections, whereas those who arrived later would be covered—even if their individual

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[14] Section 404(e) does so explicitly, prohibiting general permits even for small activities if they have more than *de minimis* impacts downstream when measured not just individually but cumulatively. Beyond § 404, the basic permitting program for discharges of pollutants from factories and sewage treatment plants also requires that permits include effluent limits adequate to prevent violations of water quality standards when measured cumulatively, in combination with all other sources of pollutants. *See* § 301(b)(1)(C) (requiring limits to prevent violations of water quality standards); § 302(a) (requiring effluent limitations more stringent than technology based limits to meet water quality goals when a "group of point sources" would otherwise cause violations); § 303(d) (requiring establishment of total maximum daily loads from all sources to attain water quality standards).

discharge was small. There is no support for this approach in the Clean Water Act, and no practical way of accomplishing it since dischargers would have no obligation to inform agencies of the nature of their discharges unless the receiving waters were regulated in the first place.

The Courts have recognized the practical impossibility of this approach. In *Ashland*, the polluter wanted to place the burden on the government to prove, "not merely that oil was discharged into a tributary of a navigable stream, but also that, in fact, the oil reached and polluted the navigable river." 504 F.2d at 1329. The Sixth Circuit rejected this approach: "To state the question is to recognize the impossibility of such proof in many if not all cases. Drops (or barrels) of oil carry no fingerprints. At the juncture of the Pond River and the Green River water analysis which might show oil pollution could not possibly prove which polluter discharged it, in what proportion, or on what occasion." *Id.*

The Corps quite properly avoided these pitfalls by defining tributaries categorically as covered waters, based on the "potential" for harm. *Deaton*, 332 F.3d at 707. Nonetheless, the categorical approach still allows less harmful projects to go forward on a case-by-case basis, through granting of a discharge permit. *See Bayview*, 474 U.S. at 135 n.9.

Manmade streams. Rapanos's allies argue that some of the streams at issue cannot be "waters of the United States" because they should be viewed as ditches, which would fall within the § 502(14) definition of "point source." This argument is untenable.

According to the National Association of Home Builders (Br. 4-5), an item that expressly appears within the point source definition cannot possibly constitute a "water[] of the United States" under § 502(7), and thus is not a "navigable water" under § 404. This approach is a frontal assault on the

longstanding application of Clean Water Act protections to all branches of a tributary system—whether natural or manmade—by which pollutants eventually flow into larger downstream waters. *See, e.g., Deaton*, 332 F.3d at 710-11.

Indeed, by this theory, a very large portion of the rivers and streams in the U.S. would lose their jurisdictional status because they have been transformed into "ditches" and "drains" through rerouting, deepening, straightening, and other alterations. Indeed, the Council on Environmental Quality has estimated that 10% of all perennial streams in the United States have been channelized in this way. Council on Environmental Quality, Environmental Trends (1989) at 35. *See also* Appendix B, infra (map indicating large number of channelized streams in Ohio). Even though the effect and purpose of this channelization is to increase downstream effects by speeding the flow of water and pollutants, by this theory the engineering work would deprive these watercourses, and downstream waters that receive their pollutants, of key water quality safeguards.

Moreover, the purported textual basis for the "ditches" argument will not withstand scrutiny. As the oil industry notes, the "point source" definition includes not only "any...ditch," but also "any...channel." American Petroleum Institute Br. 16-17 (citing § 502(14)). Given their forays across the English Channel, William the Conqueror and General Eisenhower would have been surprised to learn that a channel is *per se* not a navigable water—as would the boat owners who moor their craft in the District of Columbia's Washington Ship Channel.

In addition to the impact on waters, a *per se* exclusion of "ditches" and "drains" (or of natural tributaries, *see* API Br. 16-17) would adversely impact landowners. Many tributary streams—natural ones as well as artificial ones—are not under the control of a single owner, but instead cross

multiple properties before flowing into larger downstream waterbodies. If such multi-owner watercourses were treated as point sources but not as waters of the United States, the "discharge" would occur at the point where the watercourse empties into the larger downstream waterbody. Whoever happens to own the mouth of the ditch or stream would bear the responsibility of obtaining such a permit, and would be held responsible for all pollutants present there—even those originating in upstream properties outside their control. *See South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105 (2004) ("a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters'").

Treating these watercourses as waters of the United States avoids such problems, while fulfilling the Act's intent to control pollutants "at the source." *See Bayview*, 474 U.S. at 132-33. "Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes." *Eidson*, 108 F.3d at 1342.[15]

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[15] In a variant of the "point source" argument, the Home Builders allege (Br. 8-12) that one of the drains at issue in Carabell has been designated by the County as part of a municipal stormwater system, and therefore must be a point source and not a water of the United States. But the drain at issue long predated the existence of the Act's stormwater permitting program. Record Vol. 1 at 312:21-24 (Robert Leighton testified that the drain on Rapanos' property was built 100 years ago). A preexisting watercourse does not lose its status as a water of the United States simply because a stormwater authority designates it as part of a treatment system. Were it otherwise, adjacent wetlands such as those in *Bayview* could cease being waters of the United States

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II. THE CORPS AND EPA PROPERLY CONCLUDED THAT THE ACT'S PERMIT SAFEGUARDS PROTECT WETLANDS ADJACENT TO TRIBUTARIES.

Under the longstanding regulations of the Corps (and EPA), waters of the United States encompass not merely tributaries, but wetlands adjacent to them. 33 C.F.R. § 328.3(a)(7). Those same regulations provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Id.* § 328.3(c). As in the case of tributaries, Petitioners have shown neither that this regulation contravenes clearly expressed congressional intent under *Chevron* Step One, nor that it is an unreasonable interpretation under Step Two.

Carabell argues (Br. 39-40) that the status of a given adjacent wetland as a water of the United States should depend on a case-specific showing of hydrological connection to the tributary. *Bayview* rejected such an approach. Though "it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water," the Court upheld the Corps' decision to define "all" adjacent wetlands as United States waters. 474 U.S. at 135 n.9. "If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand." *Id.* (emphasis added).

Such a conclusion is just as reasonable for the majority of wetlands adjoining tributaries, as for the majority of

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whenever a municipality designated them as part of a stormwater management and treatment system.

wetlands adjoining traditionally navigable waters. Adjacent wetlands may be connected hydrologically to streams, either receiving water from them, or draining water to them. *See Bayview*, 474 U.S. at 134. Likewise, "adjacent wetlands may serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic species." *Id.* 134-35 (citation, internal quotations, and ellipsis omitted).

On their face, Carabell's case-specific allegations concerning the alleged lack of connection between the tributary and the adjacent wetland are unpersuasive. First, Carabell's arguments are invalid as to hydrology. In *Bayview*, this Court explicitly rejected the view that adjacent wetlands could only be regulated if flooded by the river (the view taken by the court below), reasoning that these wetlands may still "tend to drain" into the adjacent body of open water even when they are not flooded. *Id.* 134. As a class, this drainage does not depend on a surface water connection but instead occurs largely through drainage beneath the surface.[16]

Moreover, Carabell has ignored the ecological connections that *Bayview* expressly found relevant. Not only birds, mammals and amphibians, but even commercially valuable fish species can cross obstacles such as berms. For example, "[b]ecause the eel breathes quite nicely through its skin as long as it is moist, it can travel over land some

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[16] *See, e.g.*, Corps of Engineers, EP 1165-2-1, "Digest of Water Resources, Policies, and Authorities," July 30, 1999, at 13-12 (available at http://www.wbdg.org/ccb/ARMYCOE/COEPAM/1165_2_1.pdf) (visited Dec. 29, 2005) ("Other than overtopping, levees principally fail due to one or a combination of four causes: surface erosion, internal erosion (piping), underseepage, and slides within the levee embankment or foundation soils").

distance if there is so much as a heavy dew on the ground. Sometimes, if it cannot climb a dam, it just goes around it." *Bay Country, supra*, at 54. Indeed, eels travel "overland to ponds and wells more than a mile from flowing water." *Id.*

In this particular case, Carabell relies heavily on a berm and a clay soil layer that allegedly prevent water exchange between the wetland and the tributary. However, the Carabell record itself shows that there are cuts in the berm. JA Vol. 3 at 639: 16-23 (Wetland Application Hearing, Testimony of Timothy Stoepker). Likewise, it cannot simply be assumed that the clay layer has no gaps whatsoever along its entire length. Nor can it be assumed that the excavation activity associated with Carabell's project will not poke holes in that layer, allowing water to drain underneath the berm,[17] or that it will not alter flow patterns to allow water to overtop the berm. Section 404's permit requirement is expressly designed to address projects "where the flow or circulation of navigable waters may be impaired." § 404(f)(2).

In the end, however, Carabell's case-specific arguments are irrelevant. As *Bayview* confirms, the Corps' regulation validly encompasses adjacent wetlands as a category. "That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit." 474 U.S. at 135 n.9.

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[17] *See Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd*, 537 U.S. 999 (2002) (excavation activity in wetlands poked through impermeable layer, allowing water to drain through).

III. APPLYING PERMIT SAFEGUARDS TO TRIBUTARIES AND THEIR ADJACENT WETLANDS IS WELL WITHIN CONGRESS'S COMMERCE CLAUSE POWER.

Contrary to Petitioners' suggestion, application of the Act's permit safeguards to tributaries and their adjacent wetlands is well within Congress's Commerce Clause power. As shown above, tributary systems have potential to affect traditionally navigable waters by *inter alia* conveying pollutants, reducing or increasing water flow, and impairing fisheries. Indeed, this Court has already "agree[d]" with a Sixth Circuit decision upholding Clean Water Act regulation of tributaries against Commerce Clause challenge. *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264, 282 (1981), *citing Ashland*, 504 F.2d at 1325.

Moreover, as this Court has emphasized: "Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce. It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause." *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979). That authority "does not depend on a stream's 'navigability,'" and indeed "a wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved." *Id.* 174.

As the discussion *supra* reveals, Clean Water Act regulation of tributaries and adjacent wetlands derived from a combination of Congressional concerns. They included Congress's recognition that because pollution flows down into navigable waters, it must be regulated "at the source," *see Bayview*, 474 U.S. at 132-33, and its related recognition, as Senator Baker expressed, that "[c]omprehensive

jurisdiction" was necessary to avoid "unfair competition" because otherwise "dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors." 1977 Legislative History at 920. This Court has held that creating minimum, uniform national standards to prevent this kind of destructive competition between states to relax water quality standards is an appropriate justification for Congressional action under the Commerce Clause. *Hodel*, 452 U.S. at 281-82.

While the Clean Water Act considers waters' value for "navigation," § 303(c)(2)(A), it goes well beyond that to also encompass "their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes." *Id. Accord*, § 404(c) ("municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas"). Pursuit of these economic objectives through regulation of tributaries and adjacent wetlands is well within Congress's Commerce Clause power—especially as applied to Petitioners' economic activities.

Assuming *arguendo* there might be some tributaries or adjacent wetlands that do not by themselves affect downstream waters or other interests protected by the Act, that would not defeat Congress's Commerce Clause authority. "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Gonzales v. Raich*, 125 S. Ct. 2195, 2206 (2005) (citation and internal quotations omitted). *Accord*, *Citizens Bank v. Alafabco*, 539 U.S. 52, 56-57 (2003). Where appropriate, the Corps can allow such activities to proceed by issuing a permit. *See Bayview*, 474 U.S. at 135 n.9.

CONCLUSION

The judgments of the Sixth Circuit should be affirmed.

Respectfully submitted,

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Outfall located on Piney Branch, a tributary of Rock Creek in the District of Columbia.

View of Piney Branch, downstream of above outfall, showing small size of stream. Fisheries study in early 1990's found catadromous American eels in this stream.

Piney Branch: sign warning of combined sewer overflows into creek.

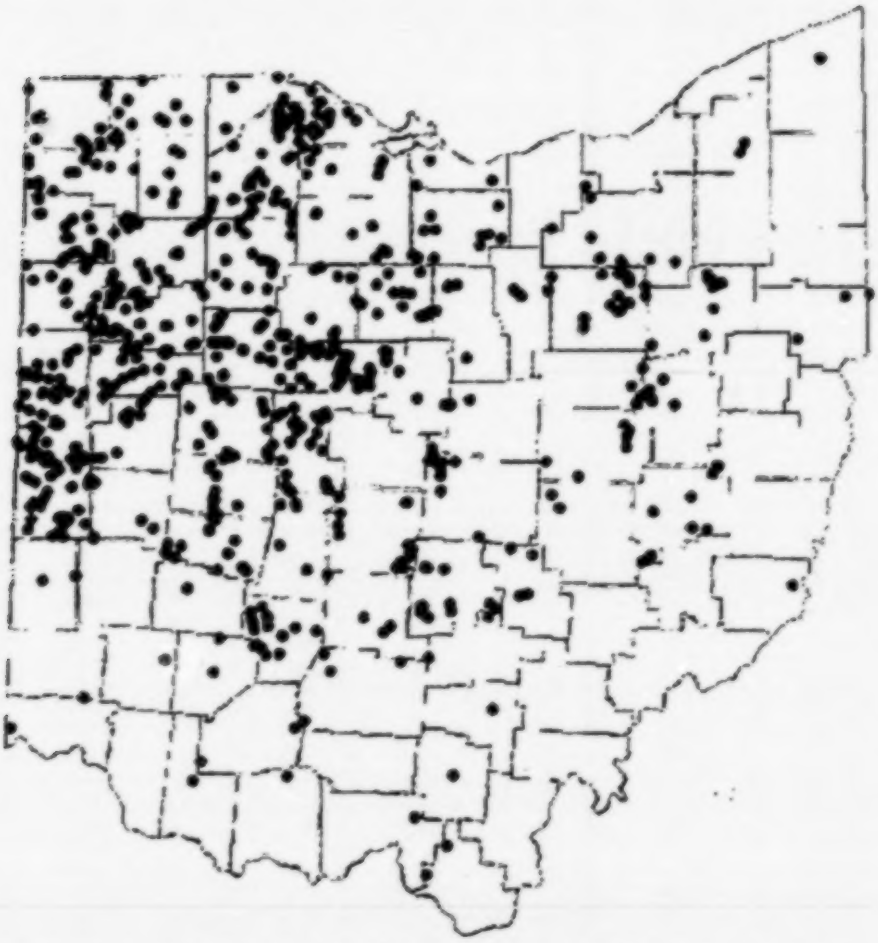
Outfall discharging into Soapstone Creek, tributary of Broad Branch, which in turn is a tributary of Rock Creek. Outfall is located behind 4411 Connecticut Avenue, NW.

Another view of the outfall discharging into Soapstone Creek behind 4411 Connecticut Avenue, NW. Note also the other outfalls, and the discoloration of the water.

View of Soapstone Creek further downstream, near eastern end of Audubon Terrace, NW, showing another outfall, and small size of stream.

View of Melvin Hazen Branch, a tributary of Rock Creek, showing small size of stream. Fisheries study in early 1990's found a catadromous American eel in this stream.

The figure below indicates stream locations in Ohio with degraded habitat due to channelization. Each of these channelized streams is effectively a "ditch."



Stream sampling locations in Ohio counties with degraded habitat due to agricultural-related channel modifications. Site characteristics include recent channelization or past channelization with no or limited recovery, low or no stream channel sinuosity and a prevailing row crop or conservation tillage surrounding land use. (Source: Ohio EPA habitat assessment database; 743 sites sampled between 1979 and 2004).